



## Legal assessment of benefits and problems with the Proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (23.04.2018)

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The proposal for a European Union whistleblower directive could create a landmark paradigm breakthrough for those who use freedom of speech to challenge abuses of power that betray the public trust. It would create binding, consistent legal rights for whistleblowers in all Member nations. Unfortunately, whether or not intentional, it includes camouflaged provisions that cancel or contradict rights, as well as contradict the proposal's stated intent. The good news is that the Directive<sup>1</sup> is better than expected, and reflects a conscientious, good faith effort. The bad news is that the Directive contains two conceptual, structural flaws. Each is an Achilles heel that not only could negate the Directive's value, but also render it counterproductive.

Further, the EU should consider numerous non-structural modifications and safeguards that are equally necessary for the rights to work as intended. These modifications should be achievable. None of the suggested solutions below is new. All have precedent in existing national laws, as well as Council of Europe, OECD and other European and international standards.

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<sup>1</sup> See: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=620400](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620400)  
[https://ec.europa.eu/info/files/proposal-directive-european-parliament-and-council-protection-persons-reporting-breaches-union-law\\_en](https://ec.europa.eu/info/files/proposal-directive-european-parliament-and-council-protection-persons-reporting-breaches-union-law_en)

Contents	Page
I     NOTEWORTHY BENEFITS	... 3
II    STRUCTURAL FLAWS - ACHILLES HEELS	... 5
1. Restrictions on audiences for protected disclosures	... 5
a)    Adverse consequences	... 5
b)    Solutions	... 8
2. Liability for malicious/abusive disclosures.	... 9
a)    Adverse consequences	...10
b)    Solutions	...11
III   NON-STRUCTURAL MODIFICATIONS: MAKING PROTECTIONS REAL	...12
1.    Scope of protected activity	...12
<i>Best practices for whistleblower laws also protect disclosures of gross waste, gross mismanagement, threats to public health or safety, and human rights violations.</i>	
2.    Scope of protected audiences	...12
<i>Protection for “any” lawful disclosure of illegality or abuse of trust will ensure Directive law covers more than just the tip of the iceberg</i>	
3.    Scope of personal coverage	...14
<i>Must confirm freedom of expression rights for all citizens, including protection for reporting to competent authorities</i>	
4.    Scope of prohibited retaliation	...14
<i>To provide protection wherever it is needed a catch-all provision must be included</i>	

Contents cont'd.	Page
5. Burdens of proof	...15
<i>This is in fact the crux of the argument in any legal claim under a whistleblower protection law and one where equality of arms is essential</i>	
6. Objective boundaries: accountability for national security misconduct	...15
<i>The best practice is to permit non-classified disclosures of national security information.</i>	
7. Safeguards for Designated Officials	...16
<i>There are four cornerstones for Designated Officials to be legitimate and turn the Directive's rights into reality.</i>	
8. Support and information for whistleblowers free from conflict of interest	...16
<i>If free from conflict of interest, an Ombudsman or Designated Official's office could perform some of these functions. However independent legal advice must also be available.</i>	
9. Structural barriers against conflicts of interest acting on disclosures	...17
<i>Directive should require that whistleblowing disclosures are investigated by an entity without more than unavoidable institutional conflict of interest</i>	
10. Enfranchising whistleblowers in investigations and corrective action on their disclosures	...17
<i>There must be a structure to earn whistleblowers' confidence.</i>	
11. Transparency of results and track record	...17
<i>Since the Directive is a transparency and accountability reform, its impact must be transparent</i>	

## I NOTEWORTHY BENEFITS

Despite exceptions noted below, as a rule the Directive reflects best practices. Illustrative examples of significant provisions include –

- broad coverage throughout the labor force, extending to volunteers, unpaid interns, self-employed and shareholders;
- protection for disclosures of abuse of law, when there is not technically illegality;
- broad subject matter for protected disclosures;
- protection for disclosures of potential misconduct based on reasonable suspicion without waiting for a *fait accompli*, despite lack of evidence;
- broad definition of retaliation;
- mandatory internal whistleblower policies and follow-up procedures within state and regional administrations, and municipalities and private companies over a certain size;
- mandatory external reporting channels maintained by authorities;
- penalties for retaliating against a whistleblower, violating whistleblower confidentiality and other offenses;
- reasonable legal burdens of proof;
- a ban on civil and criminal liability for protected speech;
- overriding authority to override prior restraint through secrecy agreements or gag orders;
- provision for interim relief;
- an affirmative duty for institutional outreach so employees are aware of their rights;
- a requirement that authorities keep records of every report they receive;
- no-cost, independent information and advice for citizens on procedures and remedies; and
- periodic review of implementation.

## II STRUCTURAL FLAWS – ACHILLES HEELS

Two structural flaws in the proposed Directive not only dilute its effectiveness, but could actually undermine its stated purpose of fighting corruption:

1. Restrictions on audiences for protected disclosures
2. Liability for malicious/abusive disclosures

### 1. Restrictions on audiences for protected disclosures

As a prerequisite for protection, the proposal makes mandatory initial reporting to employers the rule, and public freedom of expression the last resort exception for whistleblowers. Whistleblowers can make external disclosures to the government only after giving the employer three to six months for action on their disclosures. There are subjective exceptions, such as when the whistleblower “could not reasonably be expected to use internal reporting channels in light of the subject matter”; or “had reasonable grounds to believe that the use of internal reporting channels could jeopardize the effectiveness of investigative actions by competent authorities.” A whistleblower can make public disclosures after prior internal or external reporting, again after a three to six month delay or with subjective exceptions – “imminent and manifest danger for the public interest”; “particular circumstances of the case”; or “a risk of irreversible damage.”

In overview, mandatory internal reporting is not necessary. Studies of corporate whistleblowers, for example, consistently report that 90-96% make their disclosures solely within the institution. Strong factors inhibit breaking ranks – fear of retaliation; an ingrained trust and identity with the employer’s organisation; and spillover consequences on colleagues and friends, to name just a few. Whistleblowers only report to the government or media in extreme cases anyway, without boundaries that cut off their anti-retaliation rights.

#### *a) Adverse consequences*

- Chilling effect from rights dependent upon a balancing test:

The point of the Directive is to increase the flow of information where needed for accountability. Unfortunately, restrictions on the channels or protected audiences for disclosures will create a significant chilling effect on disclosures, where and when they are needed most. The problem is **that since the exceptions to mandatory internal reporting are subjective, whistleblowers must guess whether they have free speech rights by going to the government or media.** They will not know until the trial is over, after a ruling whether their judgment was safe or an act of professional suicide. The exceptions themselves reflect sound principles and balancing tests from the European Court of Human Rights. However, any balancing test inherently means uncertainty, and an unnecessary chilling effect from a policy

designed to achieve the opposite. Balancing tests are not an appropriate gateway prerequisite for disclosing information about lawlessness to a competent law enforcement authority.

The U.S. faced this same challenge for public speech under the First Amendment after the Supreme Court extended that right to public employees in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The Court established a reasonable balancing test in terms of public policy criteria. There was an inherent chilling effect, however, because when employees had to decide about speaking out, they did not know in advance whether their speech were protected. That is one of the primary reasons Congress created statutory whistleblower rights with objective boundaries, to establish clear boundaries -- so would-be whistleblowers do not have to guess. In 2016, the Supreme Court upheld this principle in *Department of Homeland Security v. MacLean*. 135 S. Ct. 913 (2015).

- Undermining regulatory/civil/criminal law enforcement and justice:

If employees decide not to risk guessing wrong, they will report internally rather than go to law enforcement authorities. **This would create a structure that institutionalizes obstruction of justice in an anti-corruption reform.** The whistleblower will be providing notice of the evidence, before competent authorities get to see it – a three to six month head start to cover-up. If an institution responds in good faith, that may be fine. The point of the Directive is accountability for bad faith institutions, however. Unfortunately, the delay creates a leisurely window for them to obstruct justice. That is ample time to destroy documents, intimidate witnesses, and generally make the crime unrealistic to prosecute.

If employees decide to risk it and go to a competent authority (i.e. any regulatory body, formal law enforcement institution or independent rights commission such as an ombudsperson, information or human rights commissioner), they can be punished for fighting corruption through society's institutions to enforce the law. **This would render illegal for workers what is lawful for all other citizens.** Competent authorities are public bodies whose purposes are to regulate the conduct and activities of individuals, industries, or public bodies. They require information and citizen engagement to function properly. Many competent authorities in Europe have set up hotlines or reporting facilities to encourage reporting to them, including anonymously<sup>2</sup>. Further the UK, Ireland, and Serbia all have whistleblower protection laws which protect direct disclosures to competent authorities, and provide clear guidance on determining the reasonableness of public disclosures<sup>3</sup> which do not limit freedom of expression.

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<sup>2</sup> Austrian Prosecutors Office; the UK's National Health Service Counter Fraud Authority are some of many examples.

<sup>3</sup> See UK's PIDA, 1998 s. 43G; Serbia's Whistleblower Protection Act 2014, Article 19; Ireland's Protected Disclosure Act, s. 10.

- Increasing retaliation:

Contrary to the Directive's goals, mandatory internal reporting will increase retaliation by **requiring whistleblowers to expose themselves as threats to bad faith or corrupt organisations**. The first law of retaliation is to discredit the whistleblower, through a retaliatory investigation or anything else that will distract from the message. Mandatory internal reporting creates a three to six month window to smear the whistleblower. In theory, employees can bypass the company if afraid of retaliation, but again they will not know until the end of their case whether the courts agreed with their fears. As a result, at bad faith organisations they either will remain silent observers, or be reprisal victims. That is an unacceptable Catch 22.

- Decreasing disclosures to competent authorities/law enforcement:

Given the risks and stress, many employees will only blow the whistle once. If all must engage in mandatory internal reporting, many justifiably will feel that they have done their duty and are finished. Those who would have made their one disclosure to law enforcement directly (or indeed, a second disclosure soon after reporting internally), instead will only report to the company. Again, that works fine at a good faith institution. **At a corrupt enterprise, however, the substitute disclosure channel (ie. mandatory internal channel) will lock in ignorance for competent authorities, along with a monopoly of knowledge about incriminating evidence for organisations that should be their targets.**

- Decreasing disclosures to the media and undermining public access and right to information:

Although the prologue to the proposed Directive recognizes the "crucial" oversight role of media watchdogs, it locks in the media as a third-rate choice for whistleblowers who want to retain their rights. If an employee does not want to wait three to six months, he or she must predict whether a court will agree "with the particular circumstances of the case," such as whether press coverage or going public was necessary to prevent "irreversible damage" or an "imminent or manifest danger to the public interest." This means the whistleblower again will have to guess on winning a judicial balancing test, with the scales weighted. Those are very tough, broad and unpredictable criteria to risk a career. **The prerequisites for public freedom of expression will make media and other important NGO alternatives the last resort even when the other options (internal or to competent authorities) are unreliable or dangerous.** The Recommendation of the Council of Europe on the Protection of Whistleblowers states that any balancing between the *interests* of organisations and the *right* of the public to be protected from harm, wrongdoing or exploitation "must take into account other democratic principles such as transparency, right to information and freedom of expression". The European Court of Human Rights in *Guja v. Moldova*, # 14277/04 (Dec. 2, 2008), also stated that "the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion".

- Dis-incentivizing institutional integrity:

Requiring employees first to make reports internally does not provide a sufficiently strong incentive for organisations to act with integrity and combat corruption. **It allows employers and managers to take calculated risks – gambling that their crimes and misdeeds will not be exposed even if an employee makes an internal report.** Throughout history corrupt organisations have silenced or killed the messenger for internal warnings of misconduct. When needed most for accountability, the Directive’s structure will facilitate bad faith damage control.

## **b) Solutions**

Proven alternatives from other jurisdictions and tightening the proposed structure can significantly shrink the above concerns.

- U.S. model: This structure does not impose any subjective balancing test for protection of reports to government authorities. Public freedom of expression is also protected, except for objective exceptions – information whose release is specifically barred by statute, and properly classified, marked information to provide notice. It has worked effectively for 40 years. The premise is reasonable restrictions without having to guess.
- Irish model: One of the newest whistleblower protection laws in Europe, the Irish law builds on the UK model which, like the US, does not impose any subjective balancing test for protection of reports to “prescribed persons” i.e. competent authorities. Any balancing test only applies to “other” disclosures, closely following the principles of the ECHR jurisprudence, and thus covers disclosures made to a range of possible recipients and public disclosures whether made directly or via the media.
- Serbian model. While it requires mandatory whistleblower systems in all major public and private institutions, except for emergency scenarios like the Directive, Serbia’s whistleblower law does not protect public whistleblowing, absent prior disclosure either to the employer or competent authority.

There are two differences between the Serbian model and the proposed EU Directive – the absence of 1) mandatory internal reporting before going to competent authorities; and 2) a mandatory time lag waiting for institutional response to the disclosure. The effect is that Serbian whistleblowers do not face pressure to enable obstruction of justice. Again, most only will blow the whistle once. But if they receive a hostile, cynical or dismissive response from an employer or competent authority in the morning, Serbian whistleblowers can alert NGOs or the media in the afternoon without sacrificing their rights.



- Romanian model. Passed in 2004 as the first stand-alone whistleblower law in continental Europe, the “Law on the protection of public officials complaining about violations of the law” gives public employees the complete freedom to choose the recipient of their report. These choices include managers, judicial agencies, parliamentary commissions, media, NGOs, professional organisations, trade unions and employers’ organisations.
- Mandatory disclosure to competent authorities of internal reports. When an employee makes an internal report, the employer should be required to transmit a summary of the disclosure, findings and any corrective action with the country’s competent authority responsible for overseeing the whistleblower law and procedures. This would help to ensure that employers and managers do not sweep reports under the carpet.
- Adjusting the temporal baseline. A minor repair that could have significant impact is to make the three month time line start when the institution is on notice of possible misconduct, instead of when the whistleblower reports to the employer. That way there would not be a three-month minimum grace period to cover up when the whistleblower challenges *ingrained* misconduct. Further, whistleblowers could test the waters by putting the organisation on notice through an anonymous disclosure and waiting three months for corrective action, without making themselves guinea pigs to test institutional good faith. Other illustrative examples of evidence for prior notice could be the whistleblower’s testimony based on personal knowledge, organisational documents, or even records obtained through access to information laws for government agencies.
- Expanding the explicit list of exceptions. The proposed Directive’s prologue, at 13, lists additional exceptions to mandatory internal reporting, such as fear of retaliation, inadequate confidentiality protection, and conflict of interest by relevant officials. Presumably, these are examples of “subject matter” and “circumstances” exceptions. At a minimum, those criteria should be in the Directive itself. In particular, studies consistently cite fear of retaliation either as the primary or second most significant reason would-be whistleblowers remain silent observers. It is inexcusable that this fundamental motivating factor is absent from the directive’s text.

## 2. LIABILITY FOR “MALICIOUS OR ABUSIVE” WHISTLEBLOWING.

In Article 17, the proposed Directive requires member states to hold people liable for making “malicious or abusive” disclosures, including paying damages to affected parties. **This provision is duplicative and unnecessary, and its impact threatens to outweigh the proposed Directive’s benefits by substituting worse retaliation than job-related harassment.**

Most fundamentally, the threat is unnecessary. Requiring member states to create this liability would be making them duplicate preexisting law. Nearly every nation in the world already has criminal accountability for lying to the government or civil misconduct such as defamation. Further, the proposed Directive already addresses this issue as part of the definition of “reasonable belief.” It notes, at 12, that the reasonable belief prerequisite for legal protection is adequate. “This is an essential safeguard against malicious and frivolous or abusive reports, ensuring that those who deliberately and knowingly report false information do not enjoy protection.” In short, there is no need for triple liability through job retaliation, and the spectre of criminal threats or civil lawsuits by vengeful employers.

The scope of liability also is indefensibly broad. Knowingly false reports are already presumed to be malicious or abusive. Including these broader criteria also opens the door to motives testing, character assassination, and probing the behaviors and private intentions of reporting persons. Whistleblowers not deemed to have perfectly “pure” motives not only stand to lose legal protections, but will be vulnerable to worse retaliation than suffered already.

**a) Adverse consequences.**

- Neutralizing the shield against civil and criminal liability:

The requirement to create **liability for malicious or abusive whistleblowers also flatly cancels the benefits of the proposed Directive’s ban on civil and criminal liability**, which is the foundation for protection against non-workplace retaliation. While the proposal permits whistleblowers to raise protected speech as a defense, the mere act of civilly or criminally prosecuting them can achieve the desired effect. Again, it will not be determined until the trial’s completion whether the whistleblower passed the reasonable belief and motives tests. In the meantime, an unemployed whistleblower will be overwhelmed by the vastly superior resources of multilateral corporations or government prosecutors, unable to keep pace with the burdens of a retaliatory lawsuit. Many will lose simply because they do not have the resources to avoid convictions or default judgments. At a minimum, forcing whistleblowers to defend themselves against retaliatory lawsuits structurally will restore the barriers to freedom of speech that the Directive is designed to eliminate. Due to the overwhelming resource handicap, the inevitable result for many whistleblowers will be bankruptcy or imprisonment.

- Putting the whistleblower’s motives on trial:

Another of the proposed Directive’s most significant benefits is rejecting the “good faith” test, because it puts the whistleblower’s motives on trial. In terms of public policy, that is an irrelevant distraction. Prosecutors and other competent authorities do not care about a witness’ motives, except for credibility concerns. Some of history’s most significant witnesses have been motivated by revenge or self-interest. Unfortunately, by **requiring liability for malicious or abusive disclosures, the proposed Directive would put the whistleblower’s motives back on trial -- restoring through the back door a tactic that it banned through the**

**front door.** Whistleblowers should not have to explain their thoughts, justify their reasons and demonstrate their moral purity to escape liability. For public policy purposes, what counts is the accuracy of their disclosures.

- All-encompassing liability.

As previewed above, the **requirement to prosecute whistleblowers is an unrestrained blank check for retaliation.** The Black's Law international legal definition for "abusive" includes actions that are "insulting" or "harsh." The definition of "malicious" includes "willful, ... or evil design." <https://thelawdictionary.org/abusive/malicious>. These open-ended, subjective concepts literally could include any whistleblowing disclosure, included that supposedly protected in the proposed Directive. Indeed, nearly all significant whistleblowing disclosures are "insulting" or "harsh." Employers frequently go to extraordinary efforts to portray whistleblowers as "evil." One private, offhand remark expressing an emotion to a colleague or friend could cause a person to lose his or her legal protections, despite the accuracy and significance of the whistleblowing disclosure.

- Freezing effect.

While job-related retaliation creates a chilling effect, the proposed Directive could create a freezing effect. That is because **it encourages substitution of civil and criminal prosecutions that threaten to destroy whistleblowers' lives, for workplace retaliation that threatens their careers.** That is what happened in the U.S. after passage of the Whistleblower Protection Enhancement Act of 2012 and associated corporate laws. Criminal investigations, prosecutions and multi-million dollar civil lawsuits have replaced termination as the reprisals of choice. The net impact could well be to make whistleblowing more dangerous, rather than more safe.

## **b) Solutions.**

- Remove the provision. This is the cleanest, most obvious solution. It is warranted, because the provision is unnecessary, duplicative and severely undermines the proposed Directive's objectives by creating a more severe threat to freedom of speech. According to the Council of Europe's 2014 recommendation, a whistleblower law should be written "to preclude...the motive of the whistleblower...as being relevant to the question of whether or not the whistleblower is to be protected." There should be no possibility for a person's private thoughts or intentions to be taken into consideration or held against them, except to review the credibility of their disclosures.
- Limit the provision to relevance for its stated basis. As previewed above, the proposed Directive's explanatory notes, at 15, further justify accountability for irresponsibly prosecutions as necessary to prevent "knowingly false" whistleblowing

disclosures. While duplicative of current law, at least that is an objective form of misconduct with clear boundaries. Any threats in the Directive should be limited to clearly defined misconduct, drafted to explicitly exclude protected speech and not require the whistleblower to guess.

- Maintain the boundary but eliminate the threats – *the Serbian model*. Serbia's whistleblower law includes accountability for irresponsible disclosures, but without the threats. It simply reminds whistleblowers that the law does not protect knowingly false disclosures. This accomplishes the same public policy objective, without inviting retaliatory litigation and scaring whistleblowers into silence.
- Accountability for retaliatory lawsuits. While the proposed Directive makes protected speech an affirmative defense against criminal and civil liability, as discussed above that is small solace for whistleblowers who cannot afford to keep pace with retaliatory litigation. An effective measure would make lawsuits against protected speech a violation of the Directive. As discussed above, retaliatory litigation can be far more destructive than mere workplace reprisals. Under the proposal's terms, however, employers have nothing to lose by escalating from workplace harassment to those far uglier tactics. The Directive should impose accountability for the most severe form of retaliation, or it could be net counterproductive by encouraging it.

### III NON-STRUCTURAL MODIFICATIONS: MAKING PROTECTIONS REAL

A series of modifications consistent with the proposed Directive's structure will make it more likely to achieve its purpose. The Directive includes two tests on the individual whistleblower when seeking protection. The first is to show they had reasonable grounds to believe that a disclosure was "true" at the time of making the report when raising it with one's own employer which is already higher than best practice for internal reports. It must be understood that internal reports are made within a working relationship where there is no issue of any potential breach of confidentiality – so being able to show reasonable grounds that the information tends to show potential wrongdoing covered by the Directive should be enough. Employers across Europe are setting set up ethics and reporting lines in the hope that staff will avail themselves to raise issues of all sorts. There is now a risk that individuals using such facilities will find themselves not protected, particularly if the organisation is acting in bad faith with respect to the report they made.

#### 1. Scope of protected activity – best practice omissions

The proposed Directive wisely is not limited to illegality, which is important. It also includes abuse of authority and a wide variety of misconduct. However, the boundaries would leave

accountability loopholes. **Best practices for whistleblower laws also protect disclosures of gross waste, gross mismanagement, threats to public health or safety, and human rights violations.**

Similarly, best practices in recent years have protected those employees who “walk the talk” by refusing to violate the law. The Directive should protect those who honor its principles with deeds, as well as words, and protect those who refuse to violate the law.

## **2. Scope of protected audiences.**

For internal disclosures, the proposal only protects communications with a specific, designated official. This means it will protect the tip but exclude the iceberg for information covered by the Directive. A key omission is duty speech. The number of whistleblowers who will report or disclose information to a designated officer or “whistleblower office” is token, compared to those by employees who as part of their job duties serve the same or even more significant public policy function as whistleblowers. The Directive’s point is to create a safe channel to communicate information essential for the public interest. Duty speech is the overwhelming context. Compliance officers, auditors, inspectors, investigators, security staff, health and safety officers, and civil and criminal law enforcement personnel routinely disclose the same type information as those who file allegations. In a bad faith institution, they face retaliation for refusing to censor their reports or making inaccurate information the “official record.”

In the US experience, after hostile interpretations excluded protection, Congress amended the law explicitly to protect duty speech in 2012. To be relevant as the rule rather than the exception, the EU Directive must protect duty speech as well. It is noteworthy that the pioneer public meetings on whistleblowing was entitled the “Conference on Professional Responsibility,” held in Washington, DC in 1971. This emphasized the allegiance of employees to their professional duties and codes.

**An effective whistleblower right covers “any” lawful disclosure of illegality or other abuses of power betraying the public trust or threatening the public interest, not just an employee’s allegations against an employer.** This is an essential element in the UK’s Public Interest Disclosure Act protecting against any risk or threat of harm or wrongdoing since 1998 and the cornerstone of the U.S. Whistleblower Protection Act since 1989. This protects both duty speech as well as disclosures made in the normal course of job duties to managers or other hierarchy.

Another key element of the UK whistleblower protection law<sup>4</sup> that institutionalizes accountability is protection for those who raise suspicions of wrongdoing with their employer or any “legally responsible person.” This has two important impacts on accountability and the capacity to prevent and detect wrongdoing. The first is that the information is more likely to

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<sup>4</sup> UK’s PIDA, 1998 s.43C.

get to the “person” or body who would have the legal responsibility (and therefore potential liability) for conduct or failure to act that caused harm or broke the law. The second is that it ensures that where legal responsibility lies outside one jurisdiction the information can still get to the right place. In the case of the EU, **with serious concerns about cross-border corruption, food safety and other types of harm, it is vital that whistleblowers can go directly to competent authorities in any country.** This is why provisions for minimum cross border legal protection was also included in the Green/EFA proposal for whistleblower protection.<sup>5</sup>

### **3. Scope of personal coverage.**

While the proposal covers nearly all the labor force at some point, it does not explicitly include protection for paid interns, student workers, temporary workers, job applicants and former employees. The latter two loopholes could be particularly destructive. Protection for applicants is necessary to defend against blacklisting. Protection for former employees is necessary to defend against blacklisting, as well as interference with pension or insurance benefits. While the proposal bans some of those actions, limits on personal jurisdiction may leave protection for job applicants and former employees out of reach. Consistent with explicit protection for these whistleblowers, the Directive also should confirm that **nothing in the directive removes preexisting freedom of expression rights for all citizens, including their protection for making reports to competent authorities.**

Further, it is important that where an individual has disclosed information anonymously and their identity becomes known without their consent that they are protected by the law. This is in keeping with many employers’ and competent authorities’ practice throughout Europe to set up reporting channels or hotlines where the identity of the source is not required. In our experience, others who are associated with a whistleblowing disclosure are targeted for retaliation which is why the Irish law has included an important provision for the right for anyone to make a claim (tort action) for suffering a detriment because of the whistleblowing whether or not they were the source of it.<sup>6</sup>

### **4. Scope of prohibited retaliation.**

While the proposal has a long list of prohibited reprisals, any list inherently is incomplete. For example, the list in Article 14 does not include common tactics such as mandatory psychiatric or medical referrals, retaliatory investigations, cancellation of duties, obstruction or cancellation of retirement benefits, failure by managers to make reasonable efforts to prevent retaliation, threatened or attempted retaliation, or as discussed earlier initiation of retaliatory lawsuits or

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<sup>5</sup> See Article 4 (4) and Article 5 of the Green/EFA *Proposal for establishing minimum levels of protection for whistleblowers* (10 April 2018). <https://extranet.greens-efa.eu/public/media/file/7753/5536>

<sup>6</sup> Section 13, Ireland’s Whistleblower Protection Act 2014.

prosecutions. All must be explicitly included. Even if they are added to the list, however, the Directive would remain inherently incomplete. The tactics to harass whistleblowers are limited only by the imagination. **To provide protection wherever it is needed, the Directive must include a catch-all provision banning any actions that could chill employees from exercise of rights protected by the Directive.** Otherwise, the Directive's impact merely will be to shift from one form of retaliation to others for which employers have a blank check.

Further, the Directive must prohibit "recommendations" for retaliatory actions, as well as those actually implemented. That precludes "plausible deniability" for managers who tell hatchet men that they "don't want to know" the details; just the names of those whom the manager should fire or harass.

## **5. Burdens of proof**

After demonstrating protected speech, the proposed Directive imposes two tests on the individual whistleblower when seeking protection. The first test in seeking protection is that a whistleblower must provide reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure. This is the case's ultimate conclusion, however, and is unrealistic on a whistleblower because it requires proving the employer's state of mind.

Two solutions can address this challenge consistent with best practices and either solution is essential to addressing a fundamental aim in any credible whistleblower law – giving the individual a fighting chance to survive:

- 1) The most common test to prove a prima facie case that meet the whistleblower's burden of proof has two elements: a) the whistleblower must successfully demonstrate having made a legally-protected disclosure; b) the employer engages in a damaging action, sometimes qualified as within a reasonable time frame.
- 2) The whistleblower proves that protected speech was a "contributing factor" to the challenged personnel action. In U.S. law and at Intergovernmental Organisations using this test, "contributing factor" basically is a relevance standard that means "any factor, which alone or in combination tends to affect the outcome in any way."

After meeting one of these two tests according to best practices, the burden must then shift to the employer to prove there is no connection between the disclosure and the alleged detriment.

An employer then should be required to prove solely independent justifications for an action with clear and convincing evidence, not a mere preponderance. This standard, long a staple at Intergovernmental Organisations, the UK, and the United States, is necessary for two reasons:

- 1) There already is a prima facie case of retaliation, and the employer should be held accountable through a higher standard;

- 2) The employer has such far superior access to documents and witnesses that a higher burden is necessary to sustain an even playing field.

## **6. Objective boundaries sustaining accountability for national security misconduct.**

While all nations must be sensitive to special national security requirements, none give national security agencies immunity from the rule of law. Unfortunately, the European Commission's answers at the International Bar Association conference on the proposal implied that disclosures of misconduct by national security employees are unprotected. The Directive must protect whistleblowers at those agencies, because they may be the most significant in terms of public policy damage from illegality or abuses of power. Further, limitations on the use of national security information in protected disclosures must be limited and clearly defined. **The best practice is to permit non-classified disclosures of national security information.** There are two corresponding elements for classified information. First, information must be properly classified, rather than deemed secret to cover up misconduct. Second, restricted national security information must be marked secret at the time, so employees do not have to guess whether they are engaging in misconduct by challenging misconduct. In our experience, it always is possible to disclose a non-classified summary of illegal activities without including legitimate national defense information. Corruption is ineligible to be classified as a national security secret. If information is marked and properly classified, the employee still must be able to disclose safely to a Designated Official or the relevant Competent Authority.

## **7. Safeguards for Designated Officials**

These staff will turn the Directive's rights into reality, or false advertising. The job's duties are as high stakes as dangerous. In our experience, staff with those duties are magnets for retaliation when they back a whistleblower. As a result, to be safe many adopt *de facto* intelligence roles hostile to their stated mission, instead warning managers of potential whistleblowing disclosures and enabling preemptive retaliation. Once they lose confidence, employees will choose to remain silent rather than turn themselves in to a front for bad faith institutional management.

**The four cornerstones for Designated Officials to be legitimate** include

- 1) personal liability to the whistleblower for confidentiality breaches;
- 2) lack of discretion to take actions that prejudice a whistleblower's rights under the Directive with personal liability for those who do;
- 3) protected activity status under the Directive for all work by a Designated Official that does not violate the first two prerequisites; and
- 4) a reporting channel directly to the organisational chief so disclosures cannot be buried within the organisation.



## **8. Support services and information for whistleblowers free from conflict of interest.**

**Even in nations with long-established whistleblower laws, most employees and employers alike are not aware of their rights and responsibilities.** At a minimum, that prevents rights from achieving their desired impact; at a maximum it renders them irrelevant in practice. The two most effective solutions for this challenge are training, and a resource office available to inform whistleblowers on their rights, disclosure options, and limitations. If free from conflict of interest, an Ombudsman or Designated Official's office could perform those functions. However, this is not a replacement for access to independent legal advice which must also be available.

## **9. Structural barriers against conflicts of interest acting on disclosures.**

As discussed above, at bad faith organisations internal reporting can enable obstruction of justice. To minimize this danger, the **Directive should require that whistleblowing disclosures are investigated by an entity without more than unavoidable institutional conflict of interest**, such as the compliance or audit department.

## **10. Enfranchising whistleblowers in investigations and corrective action on their disclosures.**

All studies confirm that the most significant chilling factor is cynicism. As a result, there must be a structure to earn their confidence. The most effective tactic is to enfranchise the whistleblower in the process. The two most significant forms of this approach are in laws ranging from the U.S. to Serbia.

- 1) The Directive should institutionalize an opportunity for the whistleblower to rebut the predictable denials of those targeted by disclosures. Often, the whistleblower is the most valuable possible witness to call bluffs or expose false statements. Too often, however, they remain ignorant of denials or the report's findings until the investigation is over. Sometimes they never get to see the report that resolves issues they disclosed. As a rule, this guarantees maximum cynicism.
- 2) Whistleblowers should have an opportunity to comment on the reasonableness and completeness of draft reports on their disclosures, with their comments included as part of the report's final text. If they are enfranchised with these rights to help follow through, whistleblowers more likely will give the system a chance. Their commentary also may be the most valuable information available to assess the report's credibility.

## **11. Transparency of results and track record.**

**Since the Directive is a transparency and accountability reform, its impact must be transparent,** both through publication of reports on whistleblower charges, and the Directive's track record in each country. This also is necessary for the periodic reviews of implementation that the proposal wisely includes. Secret reports on whistleblowing disclosures and a Directive with secret results both will threaten legitimacy and undermine oversight.

With respect to the Directive's track record, at a minimum the public record should disclose –

- the number of retaliation complaints filed annually;
- the number of disclosures annually;
- the range and final time to receive a decision or report for each;
- the number of retaliation complaints screened out annually on procedural grounds;
- the annual win-loss record for decision on the merits for retaliation complaints (rulings whether or not rights have been violated);
- annual data on the number of attempts to receive interim relief and the number granted;
- annual data on the number of terminations reversed, as well as the range and average level of financial relief; and
- country-by country assessment whether the above data is available on the public record.

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